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In the Supreme Court of the United States

OCTOBER TERM, 1953.

No. 23.

WALTER J. KOWALSKI,

Petitioner,

vs.

ALBERT B. CHANDLER,
individually and as Commissioner of Baseball, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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by a former member of the old Federal League against the National and American Leagues, their constituent clubs, their respective presidents and the old National Commission which discharged a function similar to that of the present Baseball Commissioner. (269 Fed. 682-3.) The plaintiff sued for treble damages upon the ground that the defendants by combining to restrict and monopolize the supply of Major League players in violation of Sections 1 and 2 of the Sherman Act, had forced the plaintiff out of business with great loss. (269 Fed. 682.) The District Court instructed the jury that the defendants were engaged in interstate commerce, had attempted to monopolize and had monopolized "a part of that commerce, principally through what is called the 'reserve clause' and ineligible list features of certain agreements." (269 Fed. 684.) Upon the foregoing instructions, the jury returned a large verdict for the plaintiff.

At the time when the *Federal Club* case was decided, the National and American Leagues were united by the "National Agreement" with the National Association, whose membership consisted of a large number of Minor Leagues. (269 Fed. 683.) All Major and Minor League Clubs were required to use a player contract with a "reserve clause" or option to employ the player for the succeeding season. (269 Fed. 687.) Players, who violated their contract obligations or "reserve clause," were disciplined by being declared ineligible and their names were placed on "ineligible lists" which were circulated among the Clubs, (269 Fed. 687.) The players and umpires traveled and Clubs transported baseball paraphernalia, from State to State; and the Clubs purchased baseballs from national manufacturers. (269 Fed. 685; Record,*

* The printed record in this Court in the *Federal Club* case is cited as "Record."

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS.

A. OPINIONS BELOW.

The District Court dismissed the action without opinion. (R. 25-6.) The opinion of the Court of Appeals for the Sixth Circuit, filed February 20, 1953, is reported in 202 F. 2d 413 and is printed at R. 28-9.

B. JURISDICTION.

The petition for certiorari was filed on March 20, 1953, and this Court granted certiorari on May 25, 1953 (345 U. S. 963). Petitioner has invoked the jurisdiction of this Court under Title 28, U. S. C. Secs. 1254 and 2101(c). (Petition, 10.)

265-9.) The Clubs played annual schedules and a World Series; and each Club sold to a telegraph company the right concurrently to transmit play-by-play descriptions of games throughout the country from each Park in the Major Leagues. (269 Fed. 683, Record, 262, 263.)

In reversing the District Court upon the separate and independent grounds, *first*, that the giving of baseball exhibitions for profit is not an interstate but an *intrastate* activity, and *second*, that the giving of such exhibitions is not "trade or commerce" but merely a sport, the Court of Appeals laid down the following propositions:

1. A game of baseball is inherently local from its beginning to its end. (269 Fed. 684-685.)

2. The travel of players and transportation of equipment in interstate commerce are not parts of the local game and do not convert that game into an interstate activity. (269 Fed. 684-685.)

3. Baseball games are a sport and not trade; and their inherent character as a sport is not changed when they are given for profit. (269 Fed. 685.)

4. The purpose and direct effect of the player regulations is to conserve the personnel of the clubs, to promote equality of competition and to maintain public interest in the games; and their effect, "if any," upon interstate commerce (*e.g.*, the travel of players and transportation of baseball equipment) was incidental and did not involve a violation of the Sherman Act. (269 Fed. 687-688.)

As to the first ground of decision, the Court of Appeals said in part:

"The business in which the appellants were engaged, as we have seen, was the giving of exhibitions of baseball. A game of baseball is not susceptible of

C. STATUTES INVOLVED.

The pertinent parts of Sections 1 and 2 of the Sherman Act (15 U. S. C. 1, 2) and Section 4 of the Clayton Act (15 U. S. C. 15) are set forth in Petitioner's brief. (Pet. Br. 3, 4.) Petitioner in his brief also sets forth Section 3 of the Sherman Act (15 U. S. C. 3) but that Section is not applicable to, or in any way involved in, the claim which Petitioner purports to state.* If Petitioner's construction of Sections 1 and 2 of the Sherman Act were adopted, then Section 6 of the Clayton Act (15 U. S. C. 17), set forth in Petitioner's brief, Section 20 of the Clayton Act (29 U. S. C. 52)** and Sections 13(a) and (c) of the Norris-LaGuardia Act (29 U. S. C. 113(a) and (c))** would be involved.

Petitioner, under the heading "Statutes Involved," also sets forth the Fourteenth Amendment to the Constitution and Articles 55 and 56, Chapter IX of the Charter of the United Nations, each of which is patently inapplicable to Petitioner's claim. Indeed Petitioner makes no attempt whatever to show their applicability and does not even mention them anywhere else in his brief. There is no State action involved herein, and the quoted United Nations Charter Articles merely state a principle and on their face require Congressional legislation before they can be effective or applied internally in this country.

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* The Complaint does not allege, but affirmatively negatives, that any of the acts or transactions upon which Petitioner bases his claims were performed or occurred either in the District of Columbia or in a Territory; and the allegations of the Complaint establish that in any event Petitioner could not have been damaged by any alleged restraint of local activities in the District or in any of the Territories.

** Set forth in Appendix to this brief.

being transferred. The players, it is true, travel from place to place in interstate commerce, but they are not the game. Not until they come into contact with their opponents on the baseball field and the contest opens does the game come into existence. It is local in its beginning and in its end." (l. c. 684-5.)

And further:

"The transportation in interstate commerce of the players and the paraphernalia used by them was but an incident to the main purpose of the appellants, namely, the production of the game. It was for it they were in business—not for the purpose of transferring players, balls, and uniforms. The production of the game was the dominant thing in their activities." (l. c. 685.)

And further:

"The reserve clause and the publication of the ineligible lists, together with other restrictive provisions, had the effect of deterring players from violating their contracts, and hence the Federal League and its constituent clubs, of which the appellee was one, were unable to obtain players who had contracts with the appellants; in other words, these things had the intended effect, viz. of preventing players from disregarding their obligations. On these provisions, all having for their purpose the preservation by each club of its necessary quota, and no more, of players, rests the gravamen of appellee's case. It must be obvious that the restrictions thus imposed relate directly to the conservation of the personnel of the clubs, and did not directly *affect the movement of the appellee in interstate commerce.* Whatever effect, if any, they had, was incidental, and therefore did not offend against the statute." (l. c. 687-8.)*

As to the second ground of decision, the Court of Appeals said in part:

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* Emphasis supplied unless otherwise noted.

"If a game of baseball, before a concourse of people who pay for the privilege of witnessing it, is trade or commerce, then the college teams, who play football where an admission fee is charged, engage in an act of trade or commerce. *But the act is not trade or commerce; it is sport. The fact that the appellants produce baseball games as a source of profit, large or small, cannot change the character of the games. They are still sport, not trade.*" (l. c. 685.)

In unanimously affirming the decision of the Court of Appeals in the *Federal Club* case, this Court said:

"The decision of the Court of Appeals went to the root of the case, and, if correct, makes it unnecessary to consider other serious difficulties in the way of the plaintiff's recovery. A summary statement of the nature of the business involved will be enough to present the point. * * * Of course the scheme requires constantly repeated travelling on the part of the clubs, which is provided for, controlled and disciplined by the organizations, and this it is said means commerce among the States. But we are of opinion that the Court of Appeals was right.

"The business is giving exhibitions of base ball, which are purely state affairs. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in *Hooper v. California*, 155 U. S. 648, 655, the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called *trade or commerce* in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production,

D. STATEMENT OF THE CASE.

1. The Nature and Scope of the Claims Which the Complaint Purports to State.

Petitioner is a professional baseball player who, at the time his Complaint was filed and throughout his prior baseball career, played in the lower classifications of the Minor Leagues. The Complaint purports to state two *statutory* claims for recovery of treble the damages allegedly caused to Petitioner by defendants' alleged violations of Sections 1 and 2 of the Sherman Act.* As hereinafter appears, Petitioner does not allege (1) that he has ever played, or that he ever has been or is qualified to play, in the Major Leagues or in the higher classifications of Minor Leagues or (2) that he ever has been prevented from playing in the Mexican League, ever desired to do so, or ever could have obtained employment in that League. Consequently Petitioner's allegations with respect to the Major Leagues, the higher classifications of Minor Leagues, and the alleged agreement with the Mexican League, which (both in number and bulk) constitute the greater part of the Complaint, are surplusage and serve only to confuse and obscure the statement of Petitioner's alleged claims. (e.g., R. 3-6, pars. 16-9, 23-32; R. 17-18, pars. 114-120.)**

(a) The first alleged claim: The gist of Petitioner's first alleged claim is that defendants have utilized a stand-

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* Ford C. Frick, William Harridge and Brooklyn National League Baseball Club, Inc. were named as defendants but were not served with process and are not parties to this action. (R. 1, 23, 25.) Albert B. Chandler, George M. Trautman and Cincinnati Baseball Club Company were served and are the Respondents in this Court. All named defendants whether or not served with process, are hereinafter designated as "the defendants."

** Respondents moved in the alternative, to strike each and every one of these irrelevant allegations. (R. 23-5.) However, the District Court, having concluded to dismiss the Complaint, did not rule upon this alternative motion.

ard form of Minor League player contract and certain rules as to player employment to deprive Petitioner of the reasonable value of his services and of his opportunities for promotion in his calling. (R. 21, par. 144.) The first alleged claim can, we believe, be most clearly stated by summarizing, first, the alleged background facts which relate to the claim and, second, the alleged facts which constitute Petitioner's claim.

The alleged background facts which relate to the first alleged claim: "Organized Baseball," as that term is used in the Complaint, includes the two Major Leagues and the Minor Leagues which are members of a voluntary association known as the National Association of Professional Baseball Leagues. (R. 3, pars. 11-15, inc.) There are 50 Minor Leagues, classified and designated, in accordance with their respective standards of play, as AAA, AA, A, B, C and D Leagues. (R. 14-15, pars. 94-9, incl.) Petitioner alleges only that he is "capable of holding a position upon a club in Organized Baseball." (R. 2, par. 2.) Each Class A, Class B, Class C, Class D and one Class AA, League, has limited the aggregate monthly player payrolls of their respective member clubs. (R. 14-15, pars. 94-9, incl.) The obvious purpose of the foregoing over-all limitation upon the aggregate monthly player payrolls of member clubs in those Leagues is to promote equality of competition among, and to make economically feasible the operation of, the clubs of each League. There is no limit on the salary which a club may pay to an individual player.

Each of the Minor Leagues plays an annual schedule of games; and most Minor League schedules require the players to travel, and baseball equipment to be transported, interstate. Among the 50 Minor Leagues, "several" unidentified ones play inter-League or intra-League post

season series; and "many" unidentified Minor League Clubs and Minor Leagues sell rights to broadcast or telecast oral or pictorial descriptions of their regular and post season games. (R. 6, par. 33; cf. R. 4, par. 27.) There is no allegation that any of the Minor Leagues or Clubs, in or for which Petitioner ever played, ever sold such rights.

The Minor Leagues use a uniform or standard form of player contract. This contract contains covenants (1) expressly granting to the employing Club (or its assignee) an option to renew the contract for another season (interchangeably described by Petitioner as "an option" or "a reserve clause" or "a right of reservation") (R. 6, pars. 36, 37; R. 15, pars. 101-3), (2) expressly making the contract assignable and (3) providing for termination by the employing Club on ten days' notice. (R. 6, pars. 35-7; R. 7, pars. 43, 45; R. 15, pars. 101, 102.) A player, who breaches his covenant to renew for the next season, may not play with semi-professional or "independent" clubs without the permission of the employing Club. (R. 15, par. 103.) In 1946 "several" Major League players were "blacklisted" (i.e., placed on an ineligible list) for breaching the covenants to renew in their respective player contracts. (R. 16, par. 106.) It is not alleged that Petitioner, a Minor League player, was ever placed on an ineligible list or "blacklisted." On the contrary, the Complaint affirmatively shows that, at all times since he entered professional baseball, he has been regularly employed in "Organized Baseball." For brevity, the foregoing allegations, with respect to the terms of employment of players, are hereinafter designated as the "player regulations."

The terms "farming" and "farm system," as used in the Complaint, mean "the ownership of Minor League Clubs by Major League Clubs." (R. 12, par. 79.) Such ownership is not prohibited by the agreement under which

professional baseball exhibitions are given. (R. 13, par. 83.) As hereinafter appears, some of the Minor League Clubs, for which Petitioner has played, were owned by, or in the terminology of the Complaint were "farm clubs" of, Brooklyn National League Baseball Club, Inc. (an unserved defendant hereinafter called "Brooklyn" or the "Brooklyn Club").

The alleged events which relate to or affect Petitioner. Late in 1942 Petitioner signed a player contract with a Class D club. Petitioner was in military service during the 1943-5 baseball seasons and did not play for that club until the 1946 season. Thereafter Petitioner was employed by, and played for, a Class D club during the 1947 season, a Class C club during the 1948 season, Class B clubs during the 1949 season and the beginning of the 1950 season, and Class C clubs during the major part of the 1950 season and during the 1951 season. Petitioner was playing for a Class C club when the action was commenced. (R. 18, 20-1, pars. 123-6, 130-40.)

The clubs by which plaintiff was employed, and for which he played, during the 1947-49 seasons and the beginning of the 1950 season were, it is alleged, Brooklyn "farm clubs." The clubs, by and for which Petitioner was employed during the 1946 season, the major part of the 1950 season and the 1951 season, were severally "independent clubs." (R. 18, 20-1, pars. 123-6, 133, 137-40.)

Petitioner's claim, that he was deprived of his opportunities for promotion as a Minor League player, is based upon two assignments of his player contract which were, it is alleged, made after the respective ends of the 1947 and 1948 baseball seasons. The pertinent facts alleged in this respect are: During Petitioner's second season in professional baseball (1947) the Petitioner played for a Class D Brooklyn "farm club" for $150 per month. (R. 18, par.

126.) Prior to the "annual draft"* at the end of 1947 Petitioner's contract was assigned to the Pueblo Class A Club, with which Petitioner contracted to play during the 1948 season for a salary of $275 per month in the event he made the Pueblo team and of $225 per month in the event he did not. (R. 18-19, pars. 127-9.) While Petitioner was participating in 1948 spring training at the Brooklyn Club's training camp for Minor League players, Petitioner's contract was assigned to the Class B Asheville Club, with which Petitioner contracted to play in 1948 for $250 per month in the event he made the Asheville team and for $225 per month in the event he did not. While trying out for the Asheville Class B team during the 1948 training season, Petitioner wrenched his ankle, which interrupted his spring training; and his contract was assigned to the Class C Three Rivers Club, for which Petitioner played during the 1948 season at a salary of $235 per month. (R. 20, pars. 130-4.)

Prior to the "annual draft" at the end of 1948, Petitioner's contract was assigned to the Class A Greenville Club with which he contracted to play during 1949. After participating in spring practice with the Greenville Club, his contract was assigned to the Class B Newport News Club, with which he contracted to play, and for which he played, during the 1949 season for $265 per month. (R. 20, pars. 135, 137.)

The foregoing assignment of Petitioner's contract to the Pueblo Class A Club near the end of 1947 gave Petitioner, who had then played only two years in Class D baseball, opportunities successively to try out for Class A,

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* The term "annual draft" as used in the Complaint, means the annual selection of player contracts by Clubs in Leagues of higher classification in professional baseball than is the League of the Club which then holds the contract of a player. (Pet. Br. 8; Pet. 5.)

B and C teams and, notwithstanding an injury sustained during 1948 spring training, enabled him to advance to a Class C club with a substantial salary increase for the 1948 season. The foregoing assignment of Petitioner's contract to the Class A Greenville Club late in 1948 gave Petitioner opportunities to try out for Class A and B teams and enabled him to advance to a Class B club with a further salary increase for the 1949 season. Nevertheless, Petitioner alleges, in substance, that the foregoing assignments to the Class A Pueblo and Greenville Clubs, respectively, deprived Petitioner of his opportunities for professional promotion for the 1948 and 1949 seasons because his contract could then be selected in the annual drafts preceding those seasons only by a club in a League of higher classification than Class A. (R. 20, Par. 136.) By this allegation Petitioner must mean that, but for such assignments, his contract might have been selected in the 1947 "annual draft" by some other Class A, B or C club for the 1948 season and in the 1948 "annual draft" by some other Class A or B club for the 1949 season and that, had these speculative possibilities been realized, they would have afforded Petitioner opportunities to try out for, and if he made good, to obtain a place on the team of some other Class A, B or C club for the 1948 season and on the team of some other Class A or B club for the 1949 season.

As a conclusion, Petitioner alleges that the defendants "have employed the uniform contract to deprive plaintiff (Petitioner) of the reasonable value of his services and with (sic) his opportunities for professional promotion contrary to" the Sherman Act and have thereby damaged Petitioner in the sum of $50,000. (R. 21, par. 144; R. 22, Prayer for Relief.) From the foregoing it is clear that Petitioner's damages, if any, are alleged to have been caused solely by reason of the contractual provisions here-

inbefore enumerated and, for brevity, designated as the "player regulations" (*Supra*, p. 5) which relate solely to certain terms which the Minor League Clubs have agreed to observe in their employment of baseball players.

(b) The second alleged claim: The second alleged claim incorporates by reference the allegations of the first alleged claim (R. 21-2, par. 145) which include an allegation that "farming" (i.e., ownership of Minor League Clubs by Major League Clubs, R. 12, par. 79) is not prohibited by the agreement under which professional baseball exhibitions are given. (R. 13, par. 83.) Nevertheless, Petitioner alleges that the defendants "have permitted" the unserved defendant Brooklyn Club to operate a "farm system" to its "unjust enrichment" through employment of Petitioner and prays for recovery of treble the amount by which the Brooklyn Club allegedly has been unjustly enriched through employment of Petitioner. (R. 22, par. 146, Prayer.) Were this alleged statutory claim otherwise sufficient and its subject matter within the jurisdiction of the federal courts, Section 4 of the Clayton Act (15 U. S. C. 15), does not create a statutory claim in favor of anyone for recovery of treble the amount by which someone else has allegedly been "unjustly enriched" through violations of the anti-trust laws or otherwise.

Throughout his brief Petitioner completely disregards the claims set forth in his Complaint and bases his entire argument upon (1) alleged facts which, although stated in his Complaint, are wholly irrelevant to his claim, (2) alleged facts which are not stated in his Complaint but which he asserts are stated in numerous private publications frequently partisan in character and (3) alleged

facts, conclusions and opinions which are not stated in his Complaint but which are allegedly stated in a Report of a Subcommittee of a Committee of the House of Representatives.

Statements of alleged facts, conclusions of fact and opinions contained in the report of the House *Subcommittee* manifestly do not constitute findings, conclusions or opinions of the Congress, of the House or even of the House Committee.

Insofar as any of such facts or conclusions of fact are alleged in the Complaint, reliance upon their statement in extraneous documents, either public or private, can add nothing to Petitioner's case and, instead, only creates confusion and raises a collateral question as to whether, and to what extent, such facts are alleged in the Complaint.

Insofar as the facts and conclusions of fact allegedly stated in the Report or in the private publications are not alleged in Petitioner's Complaint, they cannot be considered in reviewing the judgment of the lower courts (1) because they are not alleged in the Complaint as amended upon which the decisions of the lower courts are necessarily based, (2) because neither the Report nor the private publications would even be admissible in evidence as proof of any facts or conclusions of fact stated in the Report or publications (*United States v. International Harvester Co.*, 274 U. S. 693, 703; *Lomax Transportation Co. v. United States* (C. C. A. 9th), 183 Fed. 2d 331, 334; *Mutual, etc. Insurance Co. v. Tisdale*, 91 U. S. 238, 244-5; *Franklin v. Skelly Oil Co.* (C. C. A. 10th), 141 Fed. 2d 568, 572; *Gencarella v. Fyfe* (C. C. A. 1st), 171 F. 2d 419, 422-3; *United States v. Aluminum Co.*, 1 F. R. D. 71), and (3) because if, although not asserted by Petitioner, any of such facts or conclusions of fact are claimed to be within the realm of judicial notice, such a claim could not be

founded upon, or supported by, reference to the Report or to the private publications.

If statements of alleged facts, conclusions and opinions in extraneous documents could be considered upon review of judgments dismissing a complaint, it would be futile for litigants to address motions to complaints or for the lower federal courts carefully to consider and decide such motions because neither the litigants nor the lower federal courts could know whether the judgment would be reviewed in this Court on the record upon which the lower courts based their judgments or, instead, upon an entirely different record consisting of alleged facts which had been or might thereafter be stated in "Billboard," "The Sporting News," "Broadcasting-Telecasting," "Telepulse," the "Saturday Evening Post," "Fortune" and the like. (Pet. Br. 21, 22, 23, 24.)

In short, Petitioner's argument and brief completely disregard the fundamental principles that a motion to dismiss is addressed to, and must be determined upon, the well pleaded allegations of the Complaint; and that reasons based on facts not appearing in the Complaint, and evidence which the parties hope to be able to introduce at trial can not be considered. *Polk Co. v. Glover*, 305 U. S. 5, 9; *Emmons v. Smitt* (C. C. A. 6), 149 F. 2d 869, certiorari denied 326 U. S. 746; *Rozelle v. Quinn* (S. D. Cal. C. D.), 47 F. Supp. 740; *Bagby v. Cleveland Wrecking Co.* (W. D. Ky.), 28 F. Supp. 271.

2. Judgments of the Courts Below.

In the District Court Respondents moved for an order dismissing the action upon the separate and independent grounds (1) that the District Court lacks jurisdiction over the subject matter of the action and (2) that the Complaint

fails to state a claim upon which relief can be granted. (R. 23, 25.) The District Court dismissed the action upon both grounds of Respondents' motion; and the Court of Appeals affirmed the order of the District Court. (R. 25-6, 28-9; Pet. 8, 10.)

In view of Petitioner's argument concerning the reasonableness of the player regulations, it should be noted that no such question was presented to, or considered by, the courts below and is not in issue before this Court. The existence of jurisdiction over the subject matter did not in any way depend upon the reasonableness of the "player regulations." Even if the District Court had jurisdiction over the subject matter of the action and the Complaint had otherwise stated a claim upon which relief could be granted, the reasonableness of the "player regulations" could not have been judged upon a motion addressed to the Complaint but only upon evidence with respect to their history, purpose and result. *Chicago Board of Trade v. United States*, 246 U. S. 231, 238.

E. QUESTIONS PRESENTED.

This is a private statutory action for recovery of treble the damages which Petitioner allegedly sustained by reason of Respondents' alleged violations of Sections 1 and 2 of the Sherman Act. In such an action, only those alleged violations of the Sherman Act, by which Petitioner was proximately damaged, can be adjudicated or put in issue. Consequently the nature and extent of the questions here presented are determined by the scope of the private action brought by Petitioner.

Petitioner does not allege that he is, or ever has been, qualified to play in the Major Leagues or in the higher classifications of Minor Leagues. Petitioner's claim is

that he has been deprived of the reasonable value of his services and of his opportunities for promotion as a professional baseball player by the player regulations which governed his employment by various Minor League Clubs, some of which were owned by the Brooklyn Club. If Petitioner has been damaged in any way, it has necessarily been as a Minor League professional baseball player. The ultimate questions presented are:

First: Did the District Court have jurisdiction over the subject matter of the private statutory claim which Petitioner asserts?

Second: Assuming jurisdiction over the subject matter, was the judgment dismissing the action nevertheless correct because the Complaint fails to state a claim upon which relief can be granted?

These ultimate questions present the following specific questions:

1. Is the giving of and playing in Minor League professional baseball games interstate trade or commerce within the meaning of the Sherman Act?

2. Do the player regulations, by which alone Petitioner was allegedly damaged, substantially restrain some line of interstate commerce?

3. Does the Complaint fail to allege facts which, if proved, would establish that the player regulations have caused a substantial injury, or any injury, to the public?

4. Is the subject matter of Petitioner's alleged claim specifically exempted from the antitrust laws by provisions of the Clayton and Norris LaGuardia Acts?

The three alleged "questions involved" set forth in Petitioner's brief (Pet. Br. 10-11) completely disregard,

and go far beyond, the scope of his private statutory claim and the issues presented to and decided by the courts below, attribute non-existent claims to Respondents and are based on manifestly erroneous assumptions.

1. The question is not here presented whether every activity in which those in professional baseball engage or might engage is "immune" from (i.e. outside the scope of) the Sherman Act. Respondents have never advanced, and do not now advance, any such contention. The question, as shown above, is whether the player regulations, by which alone (upon the facts alleged in the Complaint) Petitioner was allegedly damaged, restrain interstate commerce within the purview of the Sherman Act. In stating his first question as he has, Petitioner erroneously assumes that the Sherman Act must apply either to all or none of the activities in which persons in professional baseball engage or may engage.

2. Neither is the question here presented as to whether or not persons in professional baseball engage in *any* activities which constitute interstate commerce. Respondents do not deny that some activities in which persons in professional baseball engage, constitute interstate commerce. What Respondents do contend is that the activities of those in professional baseball, by which Petitioner was allegedly damaged, do not constitute or restrain interstate commerce. Petitioner erroneously assumes, in so stating his second question, that if any person, club or league, engages in an activity which constitutes interstate commerce or falls within the scope of the Sherman Act then (1) every other activity in which such person, club or league engages, and (2) every activity of other persons, clubs, or leagues which do not engage in such activities,

constitutes interstate commerce and comes within the scope of the Sherman Act.

3. In his statement of each of the first and second "questions involved," Petitioner erroneously assumes that the scope of a private statutory action is as broad as the scope of a public action brought by the Government.

4. The third alleged question set forth by Petitioner is whether *Federal Baseball Club v. National League*, 259 U. S. 200, is distinguishable upon the facts from the case at bar and is not in any proper sense one of the questions presented.

ARGUMENT.

I.

NONE OF THE ALLEGED RESTRAINTS, BY WHICH PETITIONER WAS ALLEGEDLY DAMAGED, RELATE TO INTERSTATE ACTIVITIES OF TO "TRADE OR COMMERCE" WITHIN THE MEANING OF THE SHERMAN ACT.

If Petitioner has been damaged in any way, he was necessarily damaged as a Minor League professional baseball player and solely by the player regulations hereinbefore described. (*Supra*, pp. 5-9.)

A. In Federal Baseball Club v. National League, 259 U. S. 200, This Court Unanimously Held (1) That the Giving of Professional Baseball Exhibitions is Neither (a) An Interstate Activity, Nor (b) "trade or commerce" Within the Meaning of the Sherman Act and (2) That the Player Regulations Do Not Affect Any Interstate Activities or Commerce.

Federal Baseball Club v. National League, 259 U. S. 200 (hereinafter called the *Federal Club* case) was brought

could not engage in activities, whether or not commerce, which would restrain interstate trade or commerce and thereby violate the Sherman Act. Respondents do contend that, for each of the three separate and independently sufficient grounds hereinafter stated, the Congress, in passing the Sherman Act, did not intend to regulate, and did not regulate, their activities which are involved in the case at bar.

1. In enacting sections 1 and 2 of the Sherman Act, Congress did not intend to regulate, and did not regulate, intrastate activities, whether or not commerce, except when and to the extent that such intrastate activities should be utilized as the designed or effective means of restraining interstate commerce.

In passing Sections 1 and 2 of the Sherman Act, the Congress intended to protect all types of *interstate trade or commerce*, against unreasonable restraints, monopolization, or attempts to monopolize, arising from any source. If the prescribed effect upon interstate trade or commerce is shown, it is immaterial whether that effect is produced by local or interstate means. Nevertheless, the Act applies only to interstate trade or commerce; and the Congress did not purport to regulate specific intrastate activities for the protection of interstate commerce.

The sense in which Congress exercised all of its power in the Sherman Act: In passing the Sherman Act, the Congress did not, as is sometimes argued, exercise or exhaust all of its authority under the commerce clause. The Congress did intend to protect *commercial competition* in every type of interstate trade or commerce against unreasonable restraints resulting from contracts, conspiracies and combinations in restraint of trade; and it was to that end and in that sense that the Congress, in passing the Act,

exercised all the power it possessed. This does not mean, as has been argued, that the scope of the Sherman Act is to be measured by the scope of congressional authority under the commerce clause.

The statement, that the Congress, in passing the Sherman Act, intended to exercise all the power it possessed, was first made in *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427. In that case, this Court, in determining whether the business of cleaning, dyeing and renovating wearing apparel constituted trade or commerce under Section 3 of the Act, said:

> "A consideration of the history of the period immediately preceding and accompanying the passage of the Sherman Act and of the mischief to be remedied, as well as the general trend of debate in both houses, sanctions the conclusion that Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, *and to that end to exercise all the power it possessed.* In passing § 1, Congress could exercise only the power conferred by the commerce clause; but in passing § 3, it had unlimited power, except as restricted by other provisions of the Constitution." (l. c. 435.)

In *Apex Hosiery Co. v. Leader*, 310 U. S. 469, Mr. Chief Justice Stone, in construing the Sherman Act, said:

> "* * * The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.
>
> "For that reason the phrase 'restraint of trade' which, as will presently appear, had a well-understood meaning at common law, was made the means of

defining the activities prohibited. The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 434, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce. * * * It was in this sense of preventing restraints on commercial competition that Congress exercised 'all the power it possessed.' *Atlantic Cleaners & Dyers v. United States, supra*, 435." (l. c. 493-5.)

In *United States v. Frankfort Distilleries*, 324 U. S. 293, Mr. Justice Black, in distinguishing certain cases, said:

"* * * On the other hand, the sole ultimate object of respondents' combination in the instant case was price fixing or price maintenance. *And with reference to commercial trade restraints such as these*, Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.' *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495." (l. c. 297-8.)

The early construction of the Sherman Act and the development of the "flow of commerce" concept: In *United States v. E. C. Knight Co.*, 156 U. S. 1, the Court seemingly overlooked the fact that unreasonable restraints of interstate commerce violate the Act without regard to whether the means employed are intrastate or interstate. However, in *Swift & Co. v. United States*, 196 U. S. 375, the defendants had conspired to fix prices in, to restrain and to monopolize, interstate commerce in supplying meat throughout the Nation, by various means, some or all of which were local in character. (l. c. 397.)

In the *Swift* case, Mr. Justice Holmes held that the subject matter constituted a great "current of commerce among the states," that the only interruption in this current of commerce which was intended or occurred was that necessary for change of title to the cattle by sale at the stockyards and that under such circumstances "the purchase of the cattle is a part and incident of such commerce." (l. c. 398-9.)

In *Stafford v. Wallace*, 258 U. S. 495, this Court, in upholding the Packers & Stockyards Act of 1921, held that the stockyards were not a place of rest or final destination for the livestock "but *a throat through which the current flows*" (l. c. 516), that what was done in the stockyards during the brief period between receipt and shipment of the stock did not stop the flow or current of interstate commerce but "is a part of interstate commerce, *or is so associated with it* as to bring it within the power of national regulation." (l. c. 517, 519.)

In *Chicago Board of Trade v. Olsen*, 262 U. S. 1, this Court, in upholding the Grain Futures Act, applied the same principle to the flow of interstate commerce in wheat and, in approving the principle of the *Swift* case, said:

> "It refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such." (l. c. 35.)

The "current or flow of commerce" or "throat of commerce" principle which was developed and applied in the foregoing cases, is, we submit, nothing more than an embryonic stage in the development of the mor- logical principle, subsequently enunciated by this Court, that, given an unreasonable restraint of interstate commerce, it is immaterial whether the restraint is effected by local or interstate means. It cannot logically be said that intrastate

is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.

"If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States." (l. c. 208-9.)

B. Contrary to Petitioner's Contention, the Federal Club Case is Not Distinguishable Upon the Facts From the Case at Bar.

The plaintiff in the *Federal Club* case was attempting to compete with the Major League clubs in giving professional baseball exhibitions of Major League quality and, in so doing, also engaged in certain interstate activities or commerce. Plaintiff contended that the Major League clubs had utilized player regulations to engross the supply of available players with sufficient skill to produce exhibitions of that quality for the purpose of driving plaintiff and other members of the Federal League out of business and thereby destroying not only plaintiff's principal activity in giving baseball exhibitions but also the interstate activities or commerce in which plaintiff and other members of its League also engaged. It was only for that reason that the questions whether the Major League clubs were holding under contract an unnecessary number of players and whether, in consequence, the player regula-

tions affected or restrained plaintiff's activities in interstate commerce, were material or relevant. In the case at bar Petitioner is not engaged in giving professional baseball exhibitions and has never been employed, or qualified to play, in the Major Leagues; and consequently the foregoing questions are wholly irrelevant to Petitioner's claim. However, the foregoing is the only significant distinction between the *Federal Club* case and the case at bar; and manifestly that distinction does not aid Petitioner.

1. The fact, that purchasers of rights from some clubs now also utilize radio and television as well as telegraphy for transmitting descriptions of some baseball games, does not distinguish the Federal Club case from the case at bar.

First: The Complaint does not allege that the Minor Leagues or Clubs, in or for which Petitioner played, or claims to have been qualified to play, sold rights to broadcast or telecast descriptions of their games; nor does the Complaint allege that any activities of the Respondents or of any baseball clubs in relation to the sale of rights to broadcast and telecast descriptions of their games had any effect whatsoever on the Petitioner. Consequently, Petitioner's allegations with respect to the sale of such rights are wholly unrelated to his claim and furnish no factual basis for distinguishing the *Federal Club* case from the case at bar.

Second: Moreover, the fact that purchasers of rights to transmit descriptions of baseball games now transmit descriptions of some baseball games by radio and television as well as by telegraph, does not change or affect the inherent character of a baseball game as a local activity and as a sport and is not legally distinguishable from the sale of rights to transmit descriptions of games by telegraph, which was urged in the *Federal Club* case as a reason for holding that the giving of professional baseball

games was interstate commerce (*Federal Club* Br. 122-3, 154.)*

Thus in *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, this Court, in comparing communication by radio with communication by telegraph, said:

> "* * * In all essentials its procedure (radio broadcasting) does not differ from that employed in sending telegraph or telephone messages across state lines, which is interstate commerce. * * *" (l. c. 654-5.)

As pointed out by the Court of Appeals below, "the sale of broadcasting rights for radio and television" is "not different in any essential form from the sale of the rights of description of games over telegraph wires in the *Federal Baseball Club* case." (R. 29.)

The fact that since the decision in the *Federal Club* case additional media for transmitting descriptions of the games to the public have become available to the purchasers of rights, plainly cannot change the inherent character of the game as a local activity. Otherwise, any local event, which is reported by the press or by broadcasting and telecasting companies, would become an interstate activity. The fundamental fallacy underlying the contention is the failure to recognize or acknowledge the inherent and controlling difference, from the standpoint of interstate activity or commerce, between the interstate reporting of a local event and the local event itself.

Third: It is the communications companies (radio station, television station or telegraph company) and not

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* Long prior to the decision in the *Federal Club* case, this Court had held that interstate communication by telegraph was interstate commerce. (*Pensacola Telegraph Co. v. Western Union* (1877), 96 U. S. 1; *Leloup v. Port of Mobile* (1888), 127 U. S. 640; *Western Union v. Speight* (1920), 254 U. S. 17.)

the baseball clubs who, in broadcasting, telecasting or telegraphing descriptions of local games, are engaged in interstate commerce. Even the sponsors of radio and television programs, to whom the clubs sell rights in many cases, are not, by reason of their sponsorship and purchase of advertising rights on the radio or television, engaged in interstate commerce. *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650, 654.

A baseball club merely grants to radio, television or telegraph companies the right to enter its ball park and there to prepare the descriptive material which those companies, and not the ball club, subsequently transmit in interstate commerce. The license granted by the ball club precedes, and is not to be treated as a part of, the process of preparing and transmitting descriptions, oral and pictorial, of the games. *Fisher's Blend Station v. Tax Commission, supra; Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 179-183; *Moore v. Cotton Exchange*, 270 U. S. 593; *Engel v. O'Malley*, 219 U. S. 128, 138-9.

It is not the baseball game, but merely a description or representation thereof, which is transmitted in interstate commerce. These descriptions are an entirely different form of entertainment created for a different market and presented to an entirely different audience by entirely different producers than the form of entertainment produced by the ball clubs. Cf. *Utah Power & Light Co. v. Pfost, supra*, l. c. 179.

A radio broadcast is nothing but a *verbal account by others* of the game which may be transmitted either almost simultaneously or by delayed broadcast and is frequently based upon reports transmitted by telegraph. The telecast of a description of a baseball game includes precisely the same *verbal account by others* of the game which is supplemented by a visual description in the form

of pictures of those portions of the game which the telecaster either deems most interesting or is able to present. Conceding that verbal descriptions and incomplete pictorial descriptions of a baseball game may be more entertaining and satisfactory to baseball fans than descriptions transmitted by telegraph and published in newspapers or posted on bulletin boards, it is still an incontestable fact that what is transmitted to listeners or viewers, is only a description, verbal or pictorial, of the game. The game itself has not been transferred or transported anywhere but remains, as always, inherently and inescapably local. It can no more be said that a baseball game has been transmitted, transferred or transported by radio or television than it could be said that the broadcast or telecast of the inauguration of the President transported the President and the inauguration from Washington to Tombstone, Arizona.

Fourth: Even if the sale of rights to broadcast and telecast verbal and pictorial descriptions of baseball games could be held to convert such local games into an interstate or international activity, that circumstance would not transfer to the games any element of "trade or commerce." They would still remain a sport and could not affect this independent ground upon which the *Federal Club* case held that the business of exhibiting professional baseball games does not come within the scope of the Sherman Act.

2. The alleged agreement with the Mexican League and the affiliation of clubs or leagues in foreign countries with the National Association.

The alleged agreements between Respondent Chandler and a Mexican League and a Canadian League are wholly irrelevant to Petitioner's claim. The Complaint

does not allege but expressly negatives any claim that Petitioner ever has been prevented from playing in either of those leagues, ever desired to do so, ever could have obtained employment therein or ever could have obtained therein a salary larger than or as large as Petitioner had been receiving. Plainly, the location of a baseball club in a foreign country does not have any relation to the question whether the giving of professional baseball exhibitions is a local or interstate activity or is a sport and not trade or commerce; and when the *Federal Club* case was decided, the Toronto and Montreal Baseball Clubs were members of the International League. (See *Federal Club* Brief 128 and map opposite p. 126.)

3. "Farms" and the "Farm System."

The Petitioner contends that the alleged development of "farm clubs" or the "farm system" since the decision in the *Federal Club* case makes that case inapplicable. (Pet. Br. 25-9.)

There are no allegations in the Complaint that any of the Respondents owns, operates, or has any connection with a farm system. There is no charge in the Complaint or in the Brief that the Respondents, or organized baseball as a whole, or anyone in organized baseball, conspired or agreed to create farm systems. Rather the charge is that the defendants "have permitted the farm system" of the Brooklyn Club and that Respondent Chandler "gave his sanction" to a farm system. (R. 21, par. 143; R. 22, par. 146.) The Complaint affirmatively says that the farm system was originated by one man, Branch Rickey, and that it was opposed by Commissioner Landis (R. 14, pars. 88, 90). These allegations are inconsistent with any charge that the Respondents have any relation to a farm system which allegedly violates the Sherman Act.

Even if, contrary to the fact and to the allegations of the Complaint, it appeared that the Respondents had agreed to create or to operate farm systems, such an agreement would be immaterial here because the ownership or operation of a farm system does not constitute interstate commerce. Ownership of Minor League clubs by Major League clubs could not change the local activity of giving professional baseball exhibitions into an interstate activity or change it from a sport to trade or commerce. Thus, the fact that an intrastate business is carried on by a foreign corporation or its subsidiaries, does not convert the intrastate business into interstate commerce. *United States v. Yellow Cab Co.*, 332 U. S. 218, 233.

As the Petitioner alleges, the ownership by a Major League club of the stock of a corporation operating a Minor League club is not prohibited by the present Major League Agreement. (Pet. Br. 7; R. 13, par. 83.) Likewise, such stock ownership does not violate federal, state or common law; and its existence in no way detracts from the applicability of the *Federal Club* case to the case at bar.

Petitioner argues that Minor League clubs, owned by Major League clubs, are in effect training schools for Minor League players and that consequently these operations constitute interstate commerce under *International Textbook Co. v. Pigg*, 217 U. S. 91. (Pet. Br. 26, 28.) Undoubtedly Minor League Clubs, however owned, are training schools for Minor League players in the same sense that experience, training and knowledge gained by a beginner in many businesses and professions, constitute training or schooling for positions which require greater experience, knowledge and skill. The significant facts in the *Pigg* case, however, were that nothing whatever was done by the school authorities in the locality where the student lived and pursued learning, that the contracts between

the school and its students required regular and continuous interstate transportation of books, apparatus and papers which were useful or necessary in the particular course of study being pursued, and that consequently the business of the company although "of a somewhat exceptional character" constituted interstate commerce (l. c. 106). On the other hand, the training, which Minor League players receive on a Minor League club, however owned, is received locally through coaching and experience supplied and received while he is practicing for and playing in Minor League professional baseball exhibitions.

Moreover, if two or more schools at which students were instructed by a local staff were located in different states, manifestly the fact, that such local schools were colleges or branches of a single educational institution or were owned by a single public or private body, would not convert such local schools into interstate activity or commerce or cause the students at such schools to be engaged in interstate activities or commerce. Thus the fact that a single individual or a corporation owns several farms, manufacturing plants, mines or other local enterprises located in different states, does not convert such local enterprises into interstate enterprises or into interstate commerce. Much less could the fact that such local enterprises were owned and operated by corporations which were subsidiaries of a single corporation have that effect.

North American Co. v. S. E. C., 327 U. S. 686, is plainly inapposite. In that case this Court sustained the constitutionality of section 11(b)(1) of the Public Utility Holding Company Act which is a statute expressly regulating specific activities of public utility holding companies, upon the ground that the regulation of such activities, whether or not commerce, was reasonable and appropriate to protect interstate commerce. Petitioner also refers to

three other cases as having been cited in the opinion in the *North American Co.* case. (Pet. Br. 28.) Two of these cases were cited solely upon the appropriate form of an antitrust decree. (l. c. 707.) *Northern Securities Co. v. United States*, 193 U. S. 197 was also cited in support of the propositions that North American was more than an investor in its subsidiaries (l. c. 694) and that Congress may protect the freedom of interstate commerce by any appropriate means, including divestment of ownership of securities although the ownership of securities is neither interstate commerce nor commerce (l. c. 694, 706-7). Plainly, none of the three cases has any application here.

Petitioner also argues that the "farm system" constitutes interstate commerce within the Sherman Act under *Ring v. Spina* (C. C. A. 2) 148 F. 2d 647. (Pet. Br. 29.) Petitioner does not disclose in what way he conceives that case to support his contention as to the farm system. The subject matter of the *Ring* case was the activities involved in readying a play for anticipated production "on Broadway." The activities involved in readying the play for production included numerous interstate activities and "try out" productions in various theatres located in different States. The court held that this constituted interstate commerce. While the soundness of the holding is not free from doubt, it plainly has no application to the "farm system." Insofar as the farm clubs may be regarded as training schools for apprentice or Minor League players, they are analogous to the situation which would exist if a company established and maintained local schools to train persons in order to qualify them potentially to serve as skilled workers or as junior executives. Manifestly, the operation of such a school would not constitute an interstate activity or even trade or commerce.

Petitioner cites four cases in support of a contention that the "farm system" violates an alleged principle against vertical integration. (Pet. Br. 28.) Of the cases cited, only *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, makes reference to vertical integration, and it is not applicable here. Moreover, the contention is without substance for the following reasons:

First: The giving of professional baseball exhibitions, whether by a Minor League club or a Major League club is purely a local undertaking; and the Sherman Act does not apply to unreasonable restraints or monopolization of local activities or intrastate commerce.

Second: Vertical integration exists where a corporation, directly or through subsidiaries, owns or controls the materials and processes at all or several stages between the production or acquisition of the raw material and the sale of the finished product or products in a particular industry. A Major League club and its Minor League subsidiaries merely produce the same thing, that is, local professional baseball exhibitions although of different quality and in different locations. In that situation there is no vertical integration.

Third: Vertical integration, even though such integration occurs in interstate commerce or substantially affects interstate commerce, does not violate the Sherman Act unless it appears that the design or effect of the integration is substantially to restrain interstate commerce; and a mere allegation of vertical integration does not state a claim for violation of the Sherman Act. *United States v. Columbia Steel Co.*, 334 U. S. 495, 520-6; *United States v. Paramount Pictures*, 334 U. S. 131, 173-4.

4. Other alleged factual distinctions between the Federal Club case and the case at bar.

Other alleged factual distinctions between the *Federal Club* case and the instant case, which are urged by Petitioner are: (1) spring training, (2) income from concessions, (3) scorecard advertising and (4) receipts from exhibition games. (Pet. Br. 19, 20.) No factual basis for any of the foregoing contentions is alleged in the Complaint. Instead, such contentions are based either upon facts allegedly stated in extraneous documents or upon bald assertion.

However, at the time when the *Federal Club* case was decided, baseball clubs engaged in spring training and in playing exhibition games (i.e., games other than those on regular schedules), sold advertising on scorecards and operated or sold concessions for selling refreshments to spectators at the baseball parks. (Record 50, 109, 112, 468, 469.) Manifestly, the sale of refreshments to patrons at baseball parks, whether done by the club or by one who has purchased the right or concession, is a local activity; and its local character could not be affected by the question whether this local activity was carried on by a foreign corporation. Indeed, we are familiar with no principle which holds that *any and all* business done by a corporation in a State other than that of its incorporation, becomes interstate commerce. The sale of scorecards to patrons attending the games is a local activity. It does not become interstate because some advertiser upon the program is engaged in whole or in part in interstate commerce. *Packer Corp. v. Utah*, 285 U. S. 105.

It would, we think, come as a great shock to farmers to be informed that if they rent billboard space for display advertising by a company engaged in interstate commerce or "a national concern," their farming has become inter-

state commerce and their hired men are employed in interstate commerce. Yet the advertising of cigarettes upon scorecards is no more closely related to the giving of professional baseball exhibitions than is the advertising upon a billboard, erected on a farm, to the business of farming.

C. Were the Question Being Presented De Novo in This Court, the Player Regulations, By Which Alone Petitioner Was Allegedly Damaged, Would Not Fall Within the Scope of the Sherman Act Under Controlling Principles of Law.

The question presented is not whether the Congress has constitutional authority under the commerce clause to regulate, by appropriate legislation, the activities, or some of the activities, of those engaged in giving professional baseball exhibitions. Instead, the question is whether the Congress, in passing the Sherman Act in 1890, intended to regulate, or did regulate, those activities which are involved in the case at bar.

Plainly, Congress could regulate any interstate activities or transactions in which those in professional baseball engage. The Congress, by express statute, could also regulate specific local activities (whether or not commerce), in which those in professional baseball engage, to the extent that Congress should reasonably find their regulation to be necessary or appropriate to protect interstate commerce. E.g., *Wickard v. Filburn*, 317 U. S. 111, 124-5; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36-7; *United States v. Darby*, 312 U. S. 100, 117; *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 119-20. Respondents do not, as Petitioner seemingly implies, contend to the contrary of those propositions. Nor do Respondents contend that those in professional baseball

activities become interstate activities merely because they affect interstate commerce any more than it could be said that interstate activities become intrastate activities under the same circumstances.

However, the flow of commerce principle applied only to situations where some intrastate activities, which took place in the midst of an established current of interstate commerce, restrained that commerce. The case at bar presents precisely the converse situation in both respects. The business of Respondents is the giving of local professional baseball exhibitions which are not in the current of any stream of interstate commerce and do not affect or restrain any interstate commerce. Instead, certain interstate activities merely take place between the giving of the local exhibitions which is the business; and the application of this principle requires affirmance of the judgment below.

Since Mr. Justice Holmes, who formulated the flow of commerce principle in the *Swift* case and concurred in the *Stafford* and *Olsen* cases, wrote the opinion in the *Federal Club* case, it could hardly be supposed that this principle would have been overlooked had it been applicable to the situation in the *Federal Club* case. In fact it was strongly urged by the plaintiff in the *Federal Club* case. (Fed. Club Br. 144-5.) See also *United Leather Workers v. Herkert*, 265 U. S. 457, 467; *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, 152; *Industrial Ass'n. v. United States*, 268 U. S. 64, 79; *Shanks v. Delaware L. & W. RR.*, 239 U. S. 556, 558-60.

The clarification of the "flow of commerce" principle in the later and current decisions of this Court: As we understand the later and current decisions of this Court, the principle, which this Court has enunciated and applied, is that where an issue as to violation of the Sherman Act is presented, the first inquiry, although only prelimi-

nary, is whether the object of the restraint is interstate trade or commerce and, if not, the second and final inquiry is whether the intended or necessary effect is nevertheless substantially to restrain that commerce. (e.g., *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 234.) In enunciating that principle, this Court has avoided the destruction of our federal constitutional system and at the same time protected the national interest. On the other hand, a principle under which every local activity would be declared interstate commerce by legal fiction whenever any effect upon interstate commerce could be discerned, would be completely destructive of the States and would be equivalent to burning the house to get rid of the rats.

As stated by Mr. Chief Justice Hughes in *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1:

> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system." (l. c. 30.)

Again, Mr. Justice Frankfurter stated in *Polish Alliance v. Labor Board*, 322 U. S. 643:

> "The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity. * * *" (l. c. 650.)

and Mr. Justice Black, in his concurring opinion in that same case, said:

> "The doctrine that Congress may provide for regulation of activities not themselves interstate commerce, but merely 'affecting' such commerce, rests on the premise that in certain fact situations the federal government may find that regulation of purely local and intrastate commerce is 'necessary and proper' to prevent injury to interstate commerce. *Houston, E. & W. T. Ry. Co. v. United States*, 234 U. S. 342; *Second Employers' Liability Cases*, 223 U. S. 1, 46-47; and see *Wickard v. Filburn*, 317 U. S. 111, 121. In applying this doctrine to particular situations this Court properly has been cautious, and has required clear findings before subjecting local business to paramount federal regulation. *City of Yonkers v. United States*, 320 U. S. 685, and cases therein cited. It has insisted upon 'suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.'" (l. c. 652-3.)

In the case at bar, the player regulations apply only to the giving of professional baseball exhibitions which, as held by this Court, are purely local in character. Do the player regulations nevertheless unreasonably restrain some line of interstate commerce? And, if so, what line? The interstate activities, in which persons in professional baseball engage, are: (1) the interstate travel of club personnel, (2) interstate transportation of playing equipment and (3) interstate communication in scheduling the local baseball exhibitions. Manifestly, the player regulations do not in any way affect, and much less restrain, any of these interstate activities or transactions.

Persons in professional baseball also (a) enter into contracts for the purchase of baseballs, which are some-

times shipped in interstate commerce and (b) enter into contracts for the sale *to others* of rights to broadcast and telecast interstate descriptions of local baseball exhibitions. Such contracts do not constitute interstate commerce. However, were the contrary true, the player regulations do not in any way affect, and much less substantially restrain, these transactions.

Wholly apart from the *Federal Club* decision and upon the foregoing ground alone, it is, we submit, clear, both upon principle and under the other decisions of this Court, that the Sherman Act is not applicable to the statutory claim which Petitioner asserts and that the District Court had no jurisdiction over the subject matter of the action.

2. The exhibition of professional baseball games is "sport" and not "trade or commerce" under the Sherman Act.

When one examines the question *de novo* one also comes to the same conclusion as that reached in the *Federal Club* case that the exhibition of professional baseball games is "sport" and not "trade or commerce" within the meaning of the Sherman Act, and that said Act was not intended to include, and did not include, activities such as are here involved.

The Sherman Act was enacted in the era of trusts and combinations of business and its purpose was to prevent restraints on free competition in *business and commercial transactions*. As stated by this Court in *Apex Hosiery Co. v. Leader*, 310 U. S. 469:

> "* * * The end sought was the prevention of restraints to free competition in *business and commercial transactions* which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and

services, all of which had come to be regarded as a special form of public injury." (l. c. 493.)

The enterprise of giving baseball exhibitions presents a vast contrast to the ordinary commercial business; and rules and regulations imposing restrictions for the conduct of such enterprise and exhibitions, do not constitute the restraints on commercial and business transactions which the Sherman Act sought to prevent. Indeed the giving of professional baseball exhibitions includes no element of trade or commerce or commercial competition.

The competition, for and by which professional baseball exists, is the competition between the contending teams on the field and in the pennant race. The clubs in each League must be separately owned, not only to prevent actual sham exhibitions and manipulation of pennant races but also to assure and maintain public confidence that such practices do not and cannot exist. Consequently, unlike insurance and other commercial businesses, professional baseball exhibitions can be given only in cooperation with others who will provide the teams and parks necessary to afford that variety in competition among different teams which is necessary alike to attract public patronage and to provide and maintain the enjoyment and satisfaction derived by the public from attending such exhibitions. Since the existence of each club is dependent upon the availability of competing clubs and their ability to field adequate teams and to provide adequate facilities, each club has a vital interest in the solvency of every other club.

To a major and controlling extent, public interest in professional baseball depends upon uncertainty as to the outcome of the games and pennant races. Consequently, reasonably balanced competition between the contending

teams is essential both to the existence of the sport and to its enjoyment by the public. To preserve the game and to preserve public interest in the game there must be rules and regulations which will afford to all clubs a reasonable opportunity to create and maintain such balanced competition. To that end regulations, such as the player regulations, are essential as a means of preventing the wealthier clubs from acquiring all the star players.

Equally or more important is the necessity for rules and regulations which will not only assure honest and keen competition between contending teams but will also create and maintain public confidence that such honest and keen competition exists. The player regulations, which alone are involved in the case at bar, are necessary to assure, and to maintain public confidence, that the players on each team have no divided loyalty and no conflicting interest which may temper or restrain their will to win. Manifestly, if negotiations for future employment could be carried on between players and clubs other than their own, their loyalty to, and their will to win for, their own club in games against such other clubs could not be assured and in any event would be so far suspect by the public as to destroy public confidence in the game.

The foregoing are some of the essential elements involved in giving professional baseball exhibitions which sets the enterprise wholly apart from every commercial business and which mark it as an undertaking wholly outside the commercial competition which the Sherman Act was designed to protect. Such undertaking is a sport and not trade or commerce within the meaning of the Sherman Act.

3. The restraints by which Petitioner was allegedly damaged, do not restrain commercial competition; and for that reason also the Complaint fails to allege a restraint of "trade or commerce" within the meaning of the Sherman Act.

Petitioner alleges no relationship to Respondents or to Organized Baseball other than that of a player—an employee. He does not allege that he is affected by the activities of the Respondents as a fan, as a present or prospective owner or operator of a club or of concessions, or as a present or prospective purchaser of radio or television rights. His sole grievance is that the Respondents have employed the player regulations to deprive him of the reasonable value of his services and of his opportunities for professional promotion (R. 21, par. 144). Petitioner does not allege any facts which, if proved, would establish that these alleged restraints on his employment services have restrained or affected interstate transportation or the broadcasting or telecasting of descriptions of games, or any commercial competition which is protected by the Sherman Act.

A long line of cases establishes that agreements involving employment services or competition for labor (as distinguished from those involving commercial competition in supplying goods or services to the consuming public), are not within the area in which the antitrust laws operate and apply. *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495-7; *Levering and Garrigues Co. v. Morrin*, 289 U. S. 103; *Industrial Association of San Francisco v. United States*, 268 U. S. 64; *Schatte v. International Alliance, etc.* (C. A. 9), 182 F. 2d 158, 167; *Conference of Studio Unions, etc. v. Loew's, Inc.* (C. A. 9), 193 F. 2d 51, 54, cert. den., 342 U. S. 919; *United States v. Gold* (C. C. A. 2), 115 F. 2d 236.

This Court stated, in the *Apex* case, *supra*:

"A second significant circumstance is that this Court has never applied the Sherman Act in any case, whether or not involving labor organizations or activities, unless the Court was of opinion that there was some form of restraint upon *commercial competition* in the marketing of goods or services and finally this Court has refused to apply the Sherman Act in cases like the present in which local strikes conducted by illegal means in a production industry prevented interstate shipment of substantial amounts of the product but in which it was not shown that the restrictions on shipments had operated to restrain commercial competition in some substantial way. *First Coronado* case, *supra*; *Leather Workers* case, *supra*. *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103" (310 U. S. 495-7).

The principle stated in the *Apex* case is applicable to associations of employers as well as to unions. *Industrial Association v. United States*, 268 U. S. 64, 82.

An analysis of the Sherman Act cases decided by this Court reveals that associations of employers or employees which restrain employment services do not thereby violate the Sherman Act unless (1) they cause an interruption of the flow of interstate commerce, and (2) commercial competition in interstate commerce is in fact substantially affected or such be the intention of the defendants. Compare *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344; *Industrial Association v. United States*, 268 U. S. 64; *United Leather Workers' International Union v. Herkert & Meisel Trunk Co.*, 265 U. S. 457; *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495; with *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295; *Lawlor v. Loewe*, 235 U. S. 522;

Bedford Cut Stone Co. v. Stone Cutters' Association, 274 U. S. 37; *Anderson v. Shipowners' Association*, 272 U. S. 359; *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797.

In all of the foregoing cases, employment services in businesses engaged in interstate commerce were restrained. But only in those cases in which there was also a substantial restraint on commercial competition was a Sherman Act violation found. Where only employment competition has been restrained, this Court has left the decision of the controversy to economic forces or state law rather than the Sherman Act. *United States v. Hutcheson*, 312 U. S. 219, 231; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 483.

The distinction between competition for employment services and competition for commercial services (commercial competition) is brought out in *United States v. Gold*, 115 F. 2d 236 (C. A. 2), where Judge Learned Hand distinguished between (a) the services of employees to the dressing and dyeing business and (b) the services of the dressing and dyeing companies to the manufacturers of fur garments. The Court held that restraints on the former did not violate the Sherman Act. The same distinction is made in *Conference of Studio Unions v. Loew's, Inc.*, 193 F. 2d 51, cert. den. 342 U. S. 919.

Petitioner here does not allege that restraints on his employment have interfered with the flow of interstate commerce or have affected commercial competition in any degree. He thus fails to bring his claim within the area protected by the Sherman Act.

D. The Cases Cited by Petitioner in the Summary of His Argument Do Not Support Petitioner's Contention That the District Court Had Jurisdiction Over the Subject Matter of His Claim.

In Petitioner's assertion at page 32 of his brief that "organized baseball" is interstate commerce within the rationale of the cases cited, Petitioner, as generally throughout his brief, carefully avoids the question before the Court, that is, whether the activities of those in professional baseball, which are involved in the case at bar, constitute interstate trade or commerce. Instead, Petitioner argues generally, in blunderbuss fashion, as though this action involved the question whether any of the activities, in which those in professional baseball engage, are interstate commerce or interstate transactions. Such arguments are neither apposite nor helpful in the case at bar.

Associated Press v. Labor Board, 301 U. S. 103, 128 and *Associated Press v. United States*, 326 U. S. 1, 14, so far as here material, merely hold, that the commercial business of supplying news interstate and between this country and foreign nations, constitutes interstate commerce. Neither case holds that any event, occurrence or spectacle which is described in the news reports, thereby becomes interstate or foreign commerce.

In *Anderson v. Shipowners' Ass'n.*, 272 U. S. 359, an Association of shipowners, engaged in commercial competition among themselves and with others in interstate and foreign commerce, entered into an agreement with respect to the employment of seamen to work their ships. In holding that the agreement was an unlawful restraint of interstate and foreign commerce, this Court reasoned and held that an agreement among the ship-

owners not to make any contract for the transportation of cargoes without the prior approval of the Association would clearly be an unlawful restraint of interstate and foreign commerce; that "ships and those who operate them are instrumentalities of commerce and within the Commerce Clause no less than cargoes" (l. c. 362-3); that, consequently, such a restraint, operating upon both the employers and the seamen, was a direct restraint of interstate and foreign commerce, that is, upon the movement of goods in such commerce; that both the subject matter of the restraint and its direct object were interstate and foreign commerce. On the other hand, the subject of the alleged restraint in the instant case is the employment of persons to play in exhibitions of professional baseball, an admittedly local activitity, and the alleged restraint does not affect interstate or foreign commerce even incidentally or insubstantially.

In *Lorain Journal Co. v. United States*, 342 U. S. 143, the trial court had expressly found that the defendant newspaper had formulated, and was pursuing a plan to utilize its dominant position in local advertising for the express purpose of destroying, and eliminating competition by, a new radio station, which was plainly engaged in interstate commerce. This Court applied the long established principle, which was fully recognized and applied in the *Federal Club* case, that an unreasonable restraint or monopolization of *interstate commerce* does not escape the condemnation of the Sherman Act because the means utilized to effect the restraint or monopolization of interstate commerce are local restraints or monopolies.

In citing *United States v. Southeastern Underwriters Assn.*, 322 U. S. 533, Petitioner does not explain in what way, or for what reason, he contends that the activities of

those engaged in professional baseball, which are involved in the case at bar, have become interstate trade or commerce under the rationale of that case.

In the *Southeastern Underwriters* case, the question whether the "insurance business" or "insurance transactions which stretch across state lines" are within the scope of the Sherman Act came before this Court for the first time. On the other hand, the precise question presented in the case at bar, that is, whether the giving of profession baseball exhibitions constitutes "trade or commerce" within the meaning of the Sherman Act and, if not, whether the player regulations affect or restrain any line of interstate commerce, came before this Court in the *Federal Club* case and was squarely and unanimously decided against Petitioner's contention.

The *Southeastern Underwriters* case was an action brought by the United States. The indictment separately charged conspiracies in violation of Sections 1 and 2 of the Sherman Act. Defendants did not deny that their activities, if within the scope of the Sherman Act, violated that Act. (l. c. 534-6.) The District Court had dismissed the indictment upon the ground that this Court had repeatedly held "that the business of insurance is not commerce, either intrastate or interstate." 51 F. Supp. 712, 713.

On this branch of the case, this Court stated the questions to be whether "fire insurance transactions which stretch across state lines constitute 'Commerce among the several States' so as to make them subject to regulation by Congress under the Commerce Clause." (l. c. 538-9.)

That the defendant companies, although engaged in certain intrastate activities, carried on a very large volume of interstate commercial transactions, was not denied. Considering for the first time the question whether the insurance business or any of its activities fell within the

scope of the Sherman Act, this Court pointed out that the modern insurance business "holds a commanding position in the trade and commerce of our nation" (l. c. 539); that "it has become one of the largest and most important branches of commerce" (l. c. 540); that, as stated in *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389, 414-5, "Insurance * * * is practically a necessity to business activity and enterprise" (l. c. 540, f. n. 14); that insurance sold by the defendants covered not only the instrumentalities or facilities of interstate and international transportation but also "movable goods of all types carried in interstate and foreign commerce by every media of transportation" (l. c. 542); that the business of insurance is a great current or flow of commerce across State lines; that the fact that some local activities occurred in, or in close association with, this current or flow of interstate commerce did not deprive that flow of its interstate character (l. c. 546-7); and that the insurance transactions there involved constituted interstate commerce within the meaning of the commerce clause and of the Sherman Act.

Plainly, the rationale of the *Southeastern Underwriters* case is neither contrary to the principles upon which the *Federal Club* case was decided nor apposite to the case at bar. As hereinbefore shown, the "flow of commerce" principle, were it applicable to the case at bar, would require affirmance of the judgment below. (*Supra*, pp. 36-9.)

To contend or suggest that a holding, that the great national commercial business of insurance constitutes interstate commerce, is either determinative of, or apposite to, the question whether the giving of local professional baseball exhibitions constitutes trade or commerce, is

plainly absurd. It would be difficult to envision two other forms of activity which would be so inherently different and, indeed, antithetical.

No definition of interstate commerce has been, or could be, formulated which would delineate the dividing line between interstate and intrastate commerce. *United States v. Southeastern Underwriters Ass'n.*, 322 U. S. 533, 550; *McLeod v. Threlkeld*, 319 U. S. 491, 495. That dividing line must be delineated case by case in the light of the facts in each case; and even where the members of this Court are agreed upon a test or principle, different members of this Court may reach opposite conclusions in applying the principle or test to a particular case. Cf. *United States v. Southeastern Underwriters Ass'n.*, 322 U. S. 533, 548, f. n. 31.

The insurance business can be, and is, carried on independently by separate companies or business entities. The success of an insurance company, or the feasibility of its carrying on the insurance business, is not dependent upon the existence or cooperation of other insurance companies. Instead, as in the case of other commercial businesses engaged in supplying goods and services to the public, the elimination of competitors by bankruptcy or other means increases the volume of, and the profits derived from, the business of surviving companies. Plainly, unless restrained or monopolized the insurance business involves keen commercial competition; and the maintenance of competition in the insurance business, as in other commercial businesses, is essential to protect the public against excessive charges for, and monopolization of, a necessity to all business activity and enterprise.

In the enterprise of giving professional baseball exhibitions the exact converse is true. The giving of professional baseball exhibitions includes no element either of

commercial competition or of trade or commerce. (*Supra*, pp. 39-44.)

In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, this Court held that the defendants had utilized intra-state activities to effect an unreasonable restraint of, or to monopolize, interstate commerce in sugar; and the case is plainly inapplicable to the instant case.

Petitioner also cites several cases in support of the obvious proposition that interstate broadcasting and telecasting constitutes interstate commerce. (Pet. Br. 32.) However, the sale *to others* of rights to broadcast or telecast interstate descriptions of local baseball games does not convert the local games into interstate commerce any more than the sale of crops or livestock by a farmer for shipment in interstate commerce makes the operation of his farm interstate commerce or causes his hired men to be employed in interstate commerce. (*Supra*, pp. 21-4.)

Petitioner quite indefensibly cites several cases as holding that "organized baseball" is the owner of broadcasts of baseball games. (Pet. Br. 35.) The only case cited by Petitioner which deals with the property rights of clubs, is *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490. That case held that the clubs own the baseball games played by them in their parks and that this property right includes the sole proprietary right to sell to others a license to disseminate descriptions of their games. However, when the baseball club sells *to others* the right or license to transmit descriptions of its baseball games by telegraph, radio or television, the club is not the owner of the "broadcast" or "telecast" although it does have a right like any other licensor to prevent the piracy of its property. Of course "organized baseball" owns nothing and the cases do not hold that it does.

Petitioner, in his typical blunderbuss fashion, contends that "organized baseball" is interstate commerce because, as petitioner asserts, "organized baseball" sells "interstate advertising rights" and exercises "dominion" over "segments of industrial advertising." (Pet. Br. 33, 35.) This contention is without any factual basis in the allegations of the Complaint. Indeed there is not a single allegation in the Complaint which even mentions advertising or the sale of advertising rights. Were that not so, the contention would be without substance.

First: While the Major and Minor Leagues and their member clubs are called "organized baseball" in colloquial or popular language, this colloquial terminology can no more be made the basis of stating a legal claim or of determining legal issues than assertions, that "the farmers," "farm organizations," the "iron and steel industry," or the term "they say" have done or do something, could be made the basis for stating a claim against individuals in some way falling within such nebulous terms.

Neither "organized baseball" nor any of the leagues own any baseball games or sell any rights (except as a league or its president may sometime act as agent for a club), to broadcast or telecast descriptions of any game. Each game is owned by the contesting clubs; and rights to broadcast or telecast descriptions of games are sold, if at all, by the clubs owning the games. The Complaint alleges no facts which, if proved, would establish or support an inference that any of the Minor League clubs, for which Petitioner has ever played, sold any "interstate advertising rights" or any rights to broadcast or telecast descriptions of their games or that any causal relation would exist between such activities, had they occurred, and Petitioner's alleged damages.

Second: The Complaint alleges no facts which, if proved, would establish, or support an inference, that the clubs in the Major Leagues or in the higher classifications of Minor Leagues sell "interstate advertising" or exercise "dominion" over "segments" of "industrial advertising" or that had they done so, and Petitioner had been a Major League Player, there would have been any causal relation between such activities and Petitioner's alleged damages.

Third: Even if the Complaint alleged the sale of space for display advertising in ball parks or on scorecards and alleged facts showing a causal relation between those activities and Petitioner's alleged damages, such activities are purely local and could in no way bring the subject matter of Petitioner's claim within the jurisdiction of the District Court. *Foster & Kleiser Co. v. Special Site Sign Co.* (CCA-9) 85 F. 2nd 742, 745, 750, cert. den. 299 U. S. 613; *Packer Corp. v. Utah*, 285 U. S. 105.

Fourth: In support of this contention Petitioner cites *Times Picayune v. United States*, 345 U. S. 594, *Stevens Co. v. Foster & Kleiser*, 311 U. S. 255, *Indiana Pub. Co. v. Prairie Farm Pub. Co.*, 293 U. S. 268, and *Lorain Journal v. United States*, 342 U. S. 143. (Pet. Br. 33, 35.) These cases do not support but, instead, refute Petitioner's contention.

Although not alleged in the Complaint and wholly irrelevant to Petitioner's claim, Respondents concede that purchasers of rights to broadcast or telecast descriptions of baseball games expect, and attempt, to recoup the purchase price, to make a profit and to defray their other expenses by selling to advertisers "space" (time) on their radio and television programs for advertising purposes and "publishing" such advertisements on their programs. Assuming that the sale and publication of such advertise-

ments by the *purchasers* of the rights constitutes interstate commerce, nevertheless, the club, which sells rights to broadcast or telecast descriptions of its games, does not either sell or publish advertisements for anyone. In selling rights to broadcast or telecast descriptions of its games, a club no more engages in selling "interstate advertising rights" than does the author of articles or the producer of any feature which a newspaper purchases in order to enable it to attract readers and make valuable the advertising which it sells.

In *Indiana Pub. Co. v. Prairie Farm Pub. Co.*, 293 U. S. 268, that which was held to constitute interstate commerce was the interstate negotiation and execution of contracts for the publication of advertisements in newspapers circulating interstate, the interstate shipment by the advertisers to the newspapers of "electrotypes of their advertisements" to be returned after use, or held subject to the advertiser's order, the interstate shipment of substantial quantities of paper and the publication of the advertisements by the newspapers which sold the advertising. In *Times Picayune v. United States*, that which was held to constitute interstate commerce, was of the same character.

In *Lorain Journal v. United States*, 342 U. S. 143 that which was held to constitute interstate commerce included not only the interstate sale and publication of advertisements by a newspaper but also the interstate sale and publication of advertisements by a radio station in interstate commerce.

In *Stevens Co. v. Foster & Kleiser*, 311 U. S. 255, the interstate commerce restrained was in lithographs sold and transported in interstate commerce for use in display advertising on billboards. On the other hand, display ad-

vertising on billboards is not interstate commerce and unreasonable restraints of, or attempts to monopolize, that intrastate activity do not violate the Sherman Act unless their intended or actual effect is substantially to restrain some line of interstate commerce. *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. 2d 742, 745, 750, cert. den. 299 U. S. 613.

E. Petitioner Argues (a) That Some Interstate Activities by Some Clubs Bring All Activities of All Clubs Under the Sherman Act and (b) That If Some Clubs Receive An Undefined Proportion of Their Income from Interstate Activities, Then All Activities of All Clubs Become Interstate Commerce Subject to the Sherman Act. This Argument, Apparently Based on Gardella v. Chandler (C. C. A. 2), 172 F. 2d 402, is Fallacious.

Petitioner devotes a large part of his brief (Pet. Br. 18-26, 36) to two arguments which, as we understand them, are:

First: If those in professional baseball, or *any of them*, engage in *any* interstate activities or commerce or are parties to *any* interstate transactions, then *all activities* in professional baseball are interstate commerce and *all persons* in professional baseball are engaged in interstate commerce.

Second: In any event, if the income, which persons in professional baseball or *any of them* receive from interstate transactions or sources, constitutes a sufficiently large, but undefined, proportion of their or his aggregate income received from both intrastate and interstate sources, then *all activities* in professional baseball are interstate commerce and *all persons* in professional baseball (including those who receive negligible or no income

from "interstate sources") are engaged in interstate commerce. (Pet. Br. 20-1, 36.)

These arguments are based wholly upon "facts" which are not alleged in the Complaint and upon the alleged "interstate income" of *Major League clubs and not of the Minor League clubs* for which alone Petitioner has played or claims to have been qualified to play. In addition, Petitioner's computations include income realized, directly or indirectly, from the sale of refreshments to patrons at the baseball parks and for advertisements on scorecards sold to patrons at such parks, both of which are purely local and not interstate. However, laying aside the foregoing insuperable obstacles to Petitioner's reliance upon these arguments, they are manifestly fallacious.

1. As to Petitioner's first argument: It is well settled that a person, natural or corporate, may concurrently engage in both intrastate and interstate commerce and that this circumstance no more converts his activities in intrastate commerce into interstate commerce than it converts his activities in interstate commerce into intrastate commerce. *United States v. Southeastern Underwriters Ass'n.*, 322 U. S. 533, 548; *Foster & Kleiser Co. v. Special Site Sign Co.* (C. C. A. 9), 85 F. 2d 742, 750, cert. den. 299 U. S. 613. Thus, the fact that one engages in interstate commerce, does not thereby, or for that reason, subject his activities in intrastate commerce to federal regulation. *First Employers Liability Cases*, 207 U. S. 463, 502; *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330; *United States v. Chicago M. & St. P. R. Co.*, 282 U. S. 311, 327. We are not here concerned with the circumstances under which intrastate activities or commerce is subject to regulation under the Commerce Clause, but solely with what constitutes interstate commerce.

2. As to Petitioner's second argument: Manifestly, where one concurrently engages in intrastate and interstate activities or commerce, the inherent character of either activity can not in fact depend upon the relative volumes of, or the relative incomes realized from, the two activities. A principle of law which laid down such a test could be only a legal fiction. Precisely the same intrastate activity or business would be an intrastate activity or intrastate commerce if carried on by one who engaged in little or no interstate commerce or derived a relatively small income from "interstate sources" but, by some legal abracadabra, would become interstate commerce if carried on by one who was concurrently engaged in a relatively large interstate business or derived a relatively large proportion of his aggregate income from "interstate sources." Indeed, the character of the intrastate activity would or could change from month to month and from year to year, with fluctuations in the relative volume of intrastate and interstate commerce. Moreover, were the alleged principle sound, it would follow that when an interstate business is carried on by one who concurrently engages in and receives a larger income from an intrastate business, the interstate business would become intrastate and would be removed from the scope of the Sherman Act. Plainly, the argument is nonsense.

In *Gardella v. Chandler* (C. C. A. 2), 172 F. 2d 402, the three sitting Judges rendered separate opinions, no two of which are in agreement. In support of the foregoing contentions, Petitioner cites the opinion of Judge Learned Hand in that case. (Pet. Br. 21, 31.) It is true that the test laid down by Judge Hand for determining whether the giving of professional baseball exhibitions in the Major Leagues had become interstate commerce was

"whether all the interstate activities of the defendants—those, which were thought insufficient before, in conjunction with broadcasting and television—together form a large enough part of the business to impress upon it an interstate character" to which Judge Hand added "I do not know how to put it in more definite terms." (l. c. 408.) For the reasons hereinbefore stated, we submit that the theory that intrastate activities, whether or not commerce, are converted into interstate commerce whenever they are carried on by a party who simultaneously engages in interstate commerce either at all or to a relatively substantial extent, is patently fallacious. (*Supra*, pp. 54-6.)

Moreover, Judge Hand's conclusion is also invalidated by the erroneous (factual and legal) assumptions upon which it was based. He erroneously assumed that the clubs themselves engaged or participated in broadcasting and telecasting descriptions of their games. (*Supra*, pp. 21-4.) He seemingly based this erroneous assumption upon a view that whenever a club sells *to another for a lump sum* the right to broadcast or telecast descriptions of its games, the vendor club is engaged in a joint venture with the vendee radio or television company. (l. c. 407.) Were this assumption correct, then every person who sells for a lump sum any tangible or intangible thing to another, who hopes to recoup the purchase price and to make a profit by the use or resale of the things purchased, would become a joint venturer with his vendee and a participant in whatever his vendee might subsequently do, although neither the payment nor amount of the purchase price is in any way dependent upon what, if anything, is done by the purchaser with the thing purchased. No sound distinction can be drawn between the sale of tangibles and intangibles; and the assumption is manifestly fallacious.

Nor can any sound distinction be based upon the amount of time which elapses between the purchase of the tangible or intangible thing and its utilization by the vendor. Indeed, descriptions of baseball games for broadcast and telecast may, and sometimes are, made for delayed broadcasts or telecasts; and it could hardly be said that whether the sale of such rights converts the local baseball game into interstate commerce depends upon whether the broadcasts or telecasts of the descriptions of the game, made and broadcast or telecast by the vendee, are substantially simultaneous or delayed. *Utah Power & Light Co. v. Pfost*, 286 U. S. 165.

To say, as does Judge Hand, that the players are the actors and the radio listeners and television spectators are the audiences, which form "an indivisible unit as do actors and spectators in a theatre," is more picturesque than factual. Actually the professional baseball games are produced for the spectators in the park, as they have been produced for 75 years, and logically and legally the transmission of descriptions by broadcast or telecast stands upon no different footing than did the transmission of accounts of the games by telegraph, or the publication of descriptions of games and pictures of plays occurring in the game by newspapers; and the playing of the game, like "acting in a theatre," "is purely a state affair." *Hart v. Keith Vaudeville Exchange* (C. C. A. 2), 12 F. 2d 341, 344, cert. den. 273 U. S. 704.

Petitioner also cites Judge Frank's opinion in the *Gardella* case in support of the same contentions. (Pet. Br. 21.) In so far, if at all, as Judge Frank's opinion supports Petitioner's contentions, it is based upon misconceptions of fact and errors of law.

As in the case at bar, the reasonableness of the player regulations was not involved in, or open for decision on,

the *Gardella* appeal. However, Judge Frank, having erroneously conceived, upon the basis of matters outside the record, that the player regulations inflicted wrongs upon the players, concluded that the court should, "*if possible*," distinguish the decision of this Court in the *Federal Club* case and stretch the Sherman Act to cover the player regulations. (l. c. 409, 410.) Had Judge Frank's erroneous conception of the nature, operation and results of the player regulations been correct, that plainly would not have justified such an approach to the decision. As this Court has said, the Sherman Act does not provide a remedy for every wrong no matter how grievous; and the remedy for wrongs not within the Sherman Act is in the State courts or in some other form of action. *Hunt v. Crumboch*, 325 U. S. 821, 826; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 483-4.

Judge Frank relied upon a view that the *Federal Club* case could also be distinguished upon the ground that telegraph reports are "mere accounts of the games as told by others," whereas, as he erroneously supposed, transmission of the descriptions by the new media is an "instant and direct interstate transmission * * * of the games." (l. c. 412.) However, as hereinbefore shown, this view rested upon an erroneous conception of the facts (*Supra*, pp. 21-4).

Judge Frank stated the first question to be whether Congress has power under the commerce clause "to regulate the *interstate portion* of such a business as that done by defendant" (l. c. 412)—a power which had never been questioned or discussed in the case. However, Judge Frank based his conclusion, that this unquestioned power exists, upon (1) decisions relating to the Fair Labor Standards Act and the National Labor Relations Act (l. c. 412-3, 414), (2) a conclusion that this Court had held

that "Congress in the Sherman Act intended to use all the constitutional power conferred on it by the commerce clause" (l. c. 413) and (3) the *Southeastern Underwriters* case, the *Associated Press* cases and the *Mandeville Farms* case. (l. c. 413-4.) As hereinbefore shown, the cases cited under the first and third grounds for his conclusion are neither controlling nor apposite and the second ground of his conclusion is plainly erroneous. (*Supra*, pp. 31, 32, 45, 47-50.)

Judge Frank's ultimate conclusion that the player regulations should be held within the scope of the Sherman Act is based upon the following misconceptions of fact and erroneous reasoning. He concludes that the applicability of the Sherman Act should be determined, not upon the facts, but upon the assumption that the games are played solely for radio and television audiences (l. c. 414); that, upon this hypothetical assumption, the situation would not be distinguishable from the production of stage plays in radio and television studios; that he *believes* (although not theretofore judicially determined, involved or presented in the case) that producers of such plays would come within the Fair Labor Standards Act (presumably upon the ground that they would be producing something for interstate commerce) and, as a complete *non sequitur* that consequently their activities would fall within the Sherman Act. (l. c. 414-5.) Judge Frank wholly disregards the fact that the Baseball Clubs do not broadcast or telecast any descriptions of their games but merely sell rights to others for a lump sum to prepare and broadcast or telecast such descriptions.

Seemingly upon the erroneous conception that the clubs themselves broadcast or telecast descriptions of their games, Judge Frank concludes that the playing of the

games is essential "both to defendants' interstate and intrastate activities" and consequently, that the playing of the game is both an intrastate and interstate activity. More accurately stated, this is a contention that since descriptions of baseball games cannot be broadcast or telecast unless the games are played, the playing of the game is converted into interstate commerce. Livestock, wheat, cotton and innumerable other commodities cannot be sold or shipped in interstate commerce unless they have been produced or grown. A play cannot be produced on the stage, or broadcast, or telecast unless it has theretofore been written. A book cannot be published for sale in interstate commerce unless it has theretofore been written. Indeed, there could be no interstate commerce in any of the tangible or intangible subjects of that commerce unless they had theretofore been produced. Yet no one would suppose that because the production of either a tangible or intangible thing, is a condition precedent to its being sold, transported or communicated in interstate commerce, the writing of a play or of a book, or the production of livestock, cotton and other commodities or the production of other tangible or intangible things, has been converted into interstate commerce. Any other conclusion could result only in the destruction of our dual federal system and in creating a system of law which would be wholly unrelated to the facts of everyday life.

II.

THE COMPLAINT DOES NOT STATE A CLAIM UNDER SECTION 4 OF THE CLAYTON ACT (15 U. S. C. 15) FOR THE FOLLOWING REASONS, ADDITIONAL TO THOSE STATED IN POINT I:

A. THE COMPLAINT DOES NOT ALLEGE THAT THE PLAYER REGULATIONS HAVE CAUSED SUBSTANTIAL INJURY OR ANY INJURY TO THE PUBLIC; AND

B. THE SUBJECT MATTER OF THE CLAIM IS SPECIFICALLY EXEMPTED FROM THE ANTITRUST LAWS BY PROVISIONS OF THE CLAYTON AND NORRIS-LA GUARDIA ACTS.

Under our Point I, we have pointed out that the player regulations, by which alone Petitioner was allegedly damaged, do not, and are not alleged to restrain interstate or international activities or trade or commerce within the meaning of the Sherman Act. Those aspects of the case alone would demonstrate a failure to state a private treble damage claim under Section 4 of the Clayton Act as well as a lack of jurisdiction over the subject matter. Additionally, however, the Complaint fails to plead that the player regulations have caused a substantial injury or any injury to the public, and pleads facts which establish that the subject matter of Petitioner's claim is specifically exempt from the antitrust laws by provisions of the Clayton and the Norris-LaGuardia Acts.

A. The Complaint Does Not Allege That the Player Regulations Have Caused Substantial Injury or Any Injury to the Public.

Petitioner's private right of action for treble damages under Section 4 of the Clayton Act (15 U. S. C. 15) is incidental and subordinate to the protection of the public and was created to induce private persons to aid in en-

forcement of the Sherman Act. Consequently, to state a cause of action under 15 U. S. C. 15, a complaint must allege facts which would establish that the violations of the Sherman Act, by which the petitioner allegedly has been damaged, have caused substantial injury to the public. *Shotkin v. General Electric Co.* (C. C. A. 10), 171 F. 2d 236, 238-9; *Feddersen Motors v. Ward* (C. C. A. 10), 180 F. 2d 519, 521-2; *Citizens Pub. Co. v. Merchants & Manufacturers Assn.* (D.C. D. of C.), 83 F. Supp. 994, 997; *Riedley v. Hudson Car Co.* (D. C. Ky.), 82 F. Supp. 8, 10; *Glenn Coal Co. v. Dickinson Fuel Co.* (C. C. A. 4) 72 F. 2d 885; *Myers v. Shell Oil Co.* (D.C. Cal.), 96 F. Supp. 670, 674; *Arthur v. Kraft-Phenix Cheese Corp.* (D.C. Md.), 26 F. Supp. 324; *Abouaf v. Spreckels Co.*, 26 F. Supp. 830, 832-3.

Petitioner's Complaint alleges that, as a consequence of assignments to Class A clubs after the close of the 1947 and 1948 seasons, his contract could be purchased only by a club in a Class AA or higher classification and thus his opportunity to advance was restricted. He also alleges that the option to renew or the so-called "reserve clause" in his contract prevented him from obtaining the fair value of his services.

These allegations, if proved, would fail to establish a substantial injury or any injury to the public. Nothing is pleaded from which it can be inferred that the alleged restrictions on Petitioner's employment decreased the quantity or diminished the quality of professional baseball exhibitions available to the public or caused any increase in the price charged to the public for admissions to games. The public interest in baseball centers on the competition between the teams on the field—on what happens from day to day at the local ball park. The preservation of that competition is the purpose and intended effect of the restrictions on employment of which Petitioner complains.

B. Petitioner's Claim is Specifically Exempted From the Antitrust Laws by Provisions of the Clayton and the Norris-LaGuardia Acts.

Petitioner's claim is that he has been deprived of the reasonable value of his services and of opportunities for promotion as a professional baseball player by an agreement among an association of employers to use a uniform contract of employment and not to employ persons who fail or refuse to abide by the provisions of the uniform contract. The uniform player contract relates wholly to the employment of players to supply personal services or labor. This subject matter of Petitioner's claim is specifically exempted from the antitrust laws by the provisions of the Clayton and the Norris-LaGuardia Acts.

We refer to Sections 6 and 20 of the Clayton Act (15 U. S. C. 17 and 29 U. S. C. 52) and to the definitions of a labor dispute in Section 13 of the Norris-LaGuardia Act (29 U. S. C. §13(a) (c)). This Court has held that the Sherman law and Section 20 of the Clayton Act and the Norris-LaGuardia Act are to be read together in determining whether trade union conduct constitutes a violation of the Sherman law. *United States v. Hutcheson*, 312 U. S. 219. Under the definition of a labor dispute in Section 13 of the Norris-LaGuardia Act, it is clear that a dispute between an association of employers and one or more employees is a labor dispute. Section 20 of the Clayton Act exempts from the Sherman law action of "persons,* whether singly or in concert * * * from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and

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* The word "person" or "persons" is defined in Section 1 of the Clayton Act (15 U. S. C. 12) to include corporations and associations.

lawful means so to do * * *." Petitioner's claim that the Respondents, as part of an association of baseball clubs, have agreed not to employ baseball players except in pursuance to the terms and conditions of a uniform player contract falls within the precise terms of the quoted language of the Clayton Act.

Section 6 of the Clayton Act (15 U. S. C. 17) in declaring that "The labor of a human being is not a commodity or article of commerce" gives the only specific definition (by exclusion) of the term "commerce" in the antitrust laws. If the labor of a human being is not commerce, restraints on labor are not, without more, restraints on commerce. Of course, as many of the cases heretofore considered under the Sherman Act have held, restraints on labor may involve illegal restraints on commercial competition; but apart from that, restrictions on employment services in and of themselves are not restraints on commerce. *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 502.

It must, of course, be conceded that the primary purpose of the enactment of Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act was to assist labor, particularly in its organizational and bargaining activities and to enable labor organizations to employ concerted action without running afoul of the antitrust laws. Nevertheless, there is nothing in the legislative history of any of these statutes which indicates that it was the purpose of Congress that the statutes be applied, contrary to their plain language, solely for the benefit of labor or labor organizations and to the exclusion of employers and employer organizations. On the contrary, the report of the Senate Committee on the Norris-LaGuardia Act stated:

> "Moreover, it will be observed that this section (Section 6), as do most all of the other prohibitive sections of the bill, applies both to organizations of

labor and organizations of capital. The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees." (Sen. Rep. No. 163, 72nd Cong., 1st Sess. 19 (1932).)

The language of Section 20 of the Clayton Act and of the Norris-LaGuardia Act, with its frequent reference to employers and to associations of employers, is a recognition that combinations and associations of employers have a lawful function and that their existence and operation in the labor-management field was not intended to be outlawed. Thus, the anti-injunction provisions of the Norris-LaGuardia Act expressly extend to both employer and employee associations.

Here, the adoption by an association of baseball clubs of a uniform contract and rules and regulations respecting the employment and eligibility of players is a natural and necessary function to the maintenance of a competitive team sport; and concerted action of club owners which thus preserves rather than restricts the public interest in the game by requiring ball players to perform contracts and rules, comes within the letter and the spirit of these exemption statutes.

The provisions of the Clayton and Norris-LaGuardia Acts discussed above and their construction and application by the courts alone establish that the Complaint wholly fails to state a statutory claim under Section 4 of the Clayton Act (15 U. S. C. 15).

III.

ANY DEPARTURE FROM THE FEDERAL CLUB CASE SHOULD BE LEFT TO THE CONGRESS.

For more than thirty years everyone connected with professional baseball has acted in reliance upon the decision of the *Federal Club* case that the business of exhibiting professional baseball games in the aspects here involved is not within the scope of the Sherman Act. As the District Court noted in the case of *Toolson v. New York Yankees, Inc.*, 101 Fed. Supp. 93:

> "Undoubtedly large investments have been made on the strength of Mr. Justice Holmes' opinion in the Federal Baseball Club case * * *." (l. c. 95.)

Those who have entered the business of giving professional baseball exhibitions have done so in the understanding that the organization, rules and regulations of professional baseball, which are involved in the instant case, do not fall within the scope of the Sherman Act as they reasonably believed to have been authoritatively settled by the *Federal Club* decision.

Despite the unquestioned power of Congress under the commerce clause to regulate by appropriate legislation such of the activities of baseball as are interstate or as affect interstate commerce, Congress has refrained from taking any action to interfere in any way with the operation and structure of professional baseball.

Consequently, even if this Court should be in doubt as to the wisdom of the *Federal Club* decision as an original proposition, this Court should not now overrule its prior decision. *Walling v. Halliburton Oil Well Cementing Co.*, 331 U. S. 17; *Helvering v. Griffiths*, 318 U. S. 371, 402; *United States v. Title Insurance and Trust Company*, 265 U. S. 472, 486-7; *National Bank v. Whitney*, 103 U. S. 99, 102.

The applicable considerations and principle are well stated in *Walling v. Halliburton Oil Well Cementing Co.*, *supra*. There, after holding that its opinion in the *Belo* case was correct, this Court said:

> "* * * Moreover, our holding in Belo has been a rule of decision in this Court for five years, and recognized as such on each appropriate occasion. *Knowing of the Belo decision, the Congress has permitted Sec. 7(a) to stand unmodified and the courts have applied it as so construed.* Employers and employees (including those involved in this case) have regulated their affairs on the faith of it. *Even if we doubted the wisdom of the Belo decision as an original proposition, we should not be inclined to depart from it at this time.*" (l. c. 25-6.)

A consideration which has been noted by this Court in the cases cited above and which is directly pertinent here is the fact that Congress may, if it chooses, pass legislation which would regulate baseball in the future and without penalty to those who have relied upon the *Federal Club* decision. Thus, in *National Bank v. Whitney*, 103 U. S. 99, this Court said:

> "The construction of the act of Congress thus given has been acted upon by the national banks throughout the country ever since it was published. It is not unreasonable to suppose that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it. Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are

governed. *If there should be a change, the legislature can make it with infinitely less derangement of those interests than would follow a new ruling of the court, for statutory regulations would operate only in the future.*" (l. c. 102.)

A decision here that the *Federal Club* case was no longer applicable to professional baseball would penalize retroactively and quite probably disastrously the whole structure of professional baseball. The action of the Court in overruling the *Federal Club* case would necessarily require complete subjection of the activities of professional baseball to the Sherman Act without modification or qualification to meet the particular requirements of the team competition which is a unique characteristic of baseball. Congress, however, with the much greater flexibility of the legislative process, could regulate baseball's activities to the extent deemed necessary in the public interest and appropriate to the nature of the game.

The Respondents do not contend that baseball has any "immunity" from the Sherman Act or from the antitrust laws. Instead, Respondents contend only that their activities, which are involved in the instant case, do not fall within the scope of the Sherman Act; and no misuse of words can convert Respondents' position into anything else. "Immunity", in the sense used by Petitioner, is an exemption from some general duty or burden imposed upon citizens generally. The Sherman Act does not apply to intrastate activities (whether or not commerce) by whomsoever carried on, which do not restrain interstate commerce; and to point out or hold that such activities are not within the scope of the Sherman Act can no more be said to be a plea for or a grant of "immunity" than to point out or hold that a plaintiff has failed to state a claim or has

misconceived his remedy in any other action. When and if any activity of those engaged in professional baseball restrains interstate commerce unreasonably, the Sherman Act unquestionably applies and may be invoked by the proper party. But as we have repeatedly noted, such is not the case brought here, where the Petitioner seeks in a private treble damage action to recover for alleged damages arising from player regulations which in no way affect interstate trade or commerce.

The extent to which Federal regulation of professional baseball is necessary or appropriate in the public interest and within the commerce power of Congress, is a matter that should be left to the Congress. This Court having held that agreements and regulations among baseball clubs concerning the production of baseball games, including the very player regulations here involved, do not come within the Sherman Act, should apply that decision in the affirmance of the decisions of the courts below.

CONCLUSION.

For all of the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

Section 20 of the Clayton Act (29 U. S. C. 52; 38 Stat. 738)

"No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, *or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment*, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"*And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert*, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or *from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful and lawful means so to do;* or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of*

the acts specified in this paragraph be considered or held to be violations of any law of the United States."

Sections 13(a) and (c) of the Norris-LaGuardia Act (29 U. S. C. 113(a), (c); 47 Stat. 73)

"13. When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) *between one or more employers or associations of employers and one or more employees or associations of employees;* (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

* * * * *

(c) *The term 'labor dispute' includes any controversy concerning terms or conditions of employment,* or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee."*